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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 862

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

A. A. SPRAGUE AND BERNARD J. FALLON, AS RECEIVERS OF CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION

RALPH R. BRADLEY,
FREDERICK E. STOUT,
Counsel for Appellees.

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Appellees

APPEAL FROM EUPREME COURT OF ILLINOIS.

STATEMENT OF APPELLEES AGAINST APPELLANT'S ASSERTED JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Appellees, John B. Gallagher and Edward J. Quinn, as Trustees of Chicago North Shore and Milwaukee Railroad Company, they having been duly substituted for the above named prior equity receivers, present this statement disclosing matters and grounds making against the jurisdiction of the Supreme Court of the United States pursuant to paragraph 3 of Rule 12 of said court.

I.

Notice As Required by the Emergency Price Control Act Was in Fact Given in This Particular Case and Proof Made Thereof to the Illinois Commerce Commission Prior to Closing of Records Before Said Commission and Prior to Entry of Its Order.

As far as the Emergency Price Control Act cited by Appellant in its jurisdictional statement is concerned, the action of the Illinois Commerce Commission and the construction and application of the Illinois Public Utilities Act made by the Supreme Court of Illinois does not present, in this particular appeal, any conflict between the State and the Federal act and did not draw in question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution of the United States or laws of the United States because, contrary to the careless and unwarranted statements of Appellants, the required notice was, in this case, actually given to the Transportation and Public Utilities Division of the Office of Price Administration at Washington, D. C., together with consent to the timely intervention by the Price Administrator in the proceedings before the Illinois Commerce Commission on behalf of the Director of Economic Stabilization, in accordance with Procedural Regulation No. 11 of the Office of Price Administration, *prior* to the time the record in this case before said Commission was closed, and proof of such notice was given to the Commission in the form of an exhibit setting forth the complete notice, said exhibit having been received in evidence prior to the time the Attorney General, as attorney for the Illinois Commerce Commission, completed cross-examination and prior to the entry of the order of said Commission.

Furthermore, the order of the Commission entered on December 22, 1942, in this case made no reference whatever to any want of notice under the Emergency Price Control Act or want of jurisdiction because of failure to give such notice, regardless of what it may have said on that point in the other cases.

In this particular appeal Appellant, in its jurisdictional statement, has made, apparently through inadvertence or failure to read the record, a series of absolute misstatements as to the above mentioned notice. It erroneously stated that in each case the record was closed before September 15, 1942, whereas this case was not concluded before said Commerce Commission and marked heard and taken until December 19, 1942, the date on which the Attorney General of Illinois, as attorney for the Illinois Commerce Commission, completed cross-examination of Appellees' witnesses. Appellant also erroneously stated that none of the railroads or their trustees made it appear of record that they had notified the Price Administrator, whereas, as above stated, notice was given in this case, together with timely consent to intervene, and proof thereof made to the Commission in the form of an exhibit received in evidence by the Commission as Carrier's Exhibit 19.

The records before the Commission and before the Supreme Court of Illinois show that the notice in question was given on November 25, 1942, and received by the Office of Price Administration on November 26, 1942. (See abstract of record (at page 169) and additional or supplemental abstract of record (at pages 398 to 405, inclusive) before the Supreme Court of Illinois which printed documents have been included by Appellant in its Praecipe for Record.) Said notice was given within fourteen days after the Office of Price Administration issued Procedural Regu-

lation No. 11, stated to be set forth in Appendix 1, of Appellant's jurisdictional statement.

The record will also disclose that at no time, notwithstanding receipt of said notice, did the Office of Price Administration intervene, or seek to intervene, in the proceedings before the Illinois Commerce Commission, either before the entry of the Commission's order on December 22, 1942, or before the denial of a rehearing on January 12, 1943, or before either the Circuit Court of Cook County or the Supreme Court of Illinois during the various stages of appeal, and that, contrary to the misstatement of Appellant in its jurisdictional statement, said Office of Price Administration did not seek before the Supreme Court of Illinois to appear as *amicus curiae* in this case.

It is, therefore, respectfully submitted that in this case wherein the required notice and consent to timely intervention was actually given and proof thereof made to the Illinois Commerce Commission before completion of the cross-examination and before the entry of the Commission's order, the ruling of the Supreme Court of Illinois with respect to the jurisdiction of the Illinois Commerce Commission as affected by the Emergency Price Control Act cannot be said, when applied to the facts in this case, to give an interpretation to the Illinois Public Utilities Act which would make that act repugnant to the Constitution of the United States or the Emergency Price Control Act enacted thereunder, and did not draw in question the validity of a statute of the State of Illinois on the ground of it being repugnant to the Constitution or laws of the United States.

Since the Federal statute was complied with as to notice required thereunder, there cannot possibly be any question as to the right of the Illinois Commerce Commission to have granted the relief sought from it by these Appellees with-

out such action being insubordinate to the Federal constitution or said Federal statute.

This Court, in the case of *Lynch* v. *New York, ex rel. Pierson,* 293 U. S. 52, 79 L. Ed. 191, 55 Sup. Ct. 16, said:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Here the record affirmatively shows the federal statute as to notice had been complied with, so there was no conflict between the state and federal statute to be decided; and it cannot be said that the judgment as rendered could not have been given without deciding the federal question, because there was no federal question to be decided.

It is further respectfully submitted that these Appellees should not be prejudiced by the misstatements of Appellant as to the facts of record regardless of the fact that such misstatements were indubitably the result of inadvertence.

II

The Decision of the Supreme Court of Illinois Cannot Be Said to Deprive the Carriers' Passengers of Property Without Due Process of Law and Presents No Substantial Federal Question in That Respect.

As the Supreme Court of Illinois points out in its decision of September 19, 1944 (388 Ill. 138—Advance Sheets), in each case testimony and exhibits were admitted in evidence showing a substantial deficit in the income from operation of the suburban service for the year 1941 and

prior to that time and that in no case would the proposed increases in rates be sufficient to overcome the deficit shown. It also points out that there was testimony and exhibits showing the allocation of direct expenses to the suburban service and the apportionment of expenses jointly incurred in that service and the through passenger and freight and express services, that the basis of such allocation and apportionment was given in detail, and that no evidence was offered except that introduced by the carriers.

In its opinion said Court found that the Commission was in error in disregarding the evidence before it and in acting upon its own opinion and conclusions not based upon any evidence in the cases in the matter of allocation of joint expenses to suburban service.

The Court then points out that the Commission, after being furnished with statements of the system income showing system increases in 1942 over 1941, indulged in a pure speculation and assumption without any evidence in the record to support it to the effect that there had probably been a substantial increase in revenue from the suburban service during 1942.

The Court then goes on to point out that the dominant note of the approach of the Commission was to treat the suburban service as more or less of a by-product of railroad operations as a whole and that any revenue over out-of-pocket expenses received contributes that much to the final prosperity of the carrier.

The basis for this theory of the Commission, the Court points out, was contrary to law. In support of that finding the Court cited and quoted from *Northern Pacific Ry. Co.* v. *No. Dakota,* 236 U. S. 585, 59 L. ed. 735; *Norfolk & Western Ry. Co.* v. *Conley,* 236 U. S. 605, 59 L. ed. 745; *Banton* v. *Belt Line Railway Corp.,* 268 U. S. 413, 45 Sup. Ct. 534; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. ed. 819; *Mt. Carmel Public Utility and Service Co.* v. *Public Utilities Commis-*

sion, 297 Ill. 303. The portions of those cases quoted by the Supreme Court of Illinois clearly show that said Court considered those cases as authority for the general proposition that a state may not include a commodity or class of traffic, and instead of what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal.

The decision of the Supreme Court of Illinois, which did no more than refuse to permit Appellant to indulge in speculation and assumption based on system earnings when the evidence before it showed an operating deficit on the suburban service, is sought to be given an unusual and specious twist by claiming that it would have the effect of forcing the Commission to make *fiat* holdings and thereby deprive the car riders of due process.

It is submitted that there is nothing in the interpretation by the Supreme Court of Illinois of the aforementioned cases decided by this Court which is in conflict with what this Court has said therein or in subsequent cases. The most that can be said is that the Supreme Court of Illinois compelled Appellant to adhere to the evidence of record rather than to indulge in speculation and assumption based on matters outside the record or based on matters which relate to system figures as distinguished from figures relating to the class of service under consideration which showed a deficit.

As this Court held in *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 75 L. ed. 255, an extreme nicety is not required in making segregation or apportionment as to interstate business, only reasonable measures being essential. In the instant case, using the most reasonable and logical formula available, there was a complete segregation of all interstate business, whether passenger or freight, from the Illinois suburban service, and also a segregation

of street car and bus and freight business in the Illinois suburban territory. There is, therefore, nothing strange or unconstitutional to be found in the fact that the Supreme Court of Illinois held the segregation to be adequate. Neither the Commission nor anyone else offered in evidence any different segregation.

While it is true this Court holds that a rate-making body is not restricted to any set formula, it has not held, it is submitted, that such rate-making body may indulge in conjecture and speculation not substantiated by evidence or compel a carrier to transport a particular class of traffic either at less than cost, or for a compensation that is merely nominal, merely because system earnings during the progress of the hearings showed a profit.

Appellant states that it conceives it to be its duty to the public, enjoined upon it by a proper reading of the Constitution of the United States, to prevent unjust discrimination between the various classes of service. The record shows that the Interstate Commerce Commission had already granted a 10 per cent increase, not only as to interstate passenger traffic, but also as to intrastate non-commutation passenger service over which said Interstate Commerce Commission assumed jurisdiction under 13th Section proceedings under the Interstate Commerce Act. Consequently, Appellant was without authority to raise or lower those rates covered by Interstate Commerce Commission action to remove discrimination even had such discrimination existed. As a matter of fact, this was not a rate discrimination case involving alleged discrimination between commutation rates as such compared with interstate and intrastate non-commutation rates, but was an effort on the part of Appellees to obtain increases on a class of transportation which was being conducted at an operating deficit. Neither Appellant nor anyone else introduced any evidence in the case to rebut the showing made by Appellees as to

the operating deficit in their suburban operations. Instead, as the Supreme Court of Illinois points out, Appellant sought to off-set the evidence introduced by indulging in speculations and assumptions unsupported by evidence.

It cannot, therefore, be said that the decision of the Supreme Court of Illinois had the effect of depriving anyone of its property without due process guaranteed by the 14th Amendment of the Constitution of the United States; and the contention of Appellant that a substantial federal question is involved cannot, it is respectfully submitted, be sustained; nor has the Supreme Court of Illinois decided a federal question in conflict with this Court's decisions.

Furthermore, the Illinois Commerce Commission cannot be said to be injured or deprived of its property contrary to the Fourteenth Amendment to the Constitution of the United States. Therefore, it is in no position to raise such a constitutional question. *Premier-Pabst Co.* v. *Grosscup*, 298 U. S. 226, 80 L. Ed. 1155.

III.

The Judgment of the Said Court Rests On Two or More Grounds At Least One of Which Is Independent of a Federal Question and Which Is Sufficient in Itself to Sustain the Judgment.

In *Lynch* v. *New York, ex rel. Pierson*, 293 U. S. 52, 79 L. Ed. 191, 55 S. Ct. 16, this Court held that where the judgment of the state court rests on two grounds, one involving a federal question, the other not, or it does not appear upon which of the two grounds the judgment was based, and the ground independent of the federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

The attention of this Court is directed to that part of the opinion of the Supreme Court of Illinois reading as follows:

> "The orders cannot be sustained for the further reason that they contain no proper and essential findings. Section 65 of the Public Utilities Act (Ill. Rev. Stat. 1943, chap. 111 2/3, par 69) provides that the commission shall make and render findings concerning the subject matter and facts inquired into, and enter its order based thereon. In *Chicago Railways Co.* v. *Commerce Com. ex rel. Chicago Motor Coach Co.*, 336 Ill. 51, we said: 'Section 65 of the Commerce Commission act requires the commission to make and enter findings concerning the subject matter of facts inquired into and enter its order based thereon. Such findings must be specific enough to enable the court to review intelligently the decision of the commission and ascertain if the facts on which the commission has based its order afford a reasonable basis for it.'"
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> "The orders in the four cases here under consideration do not comply with the mandatory requirements of section 65 of the Public Utilities Act. They do not contain any findings as required by that section. Said orders are void for the further reason that they are not based upon the evidence and are predicated upon matters wholly outside the evidence offered before the commission. They are in form merely arguments and conclusions based upon assumptions and speculations and are not supported by the evidence in the records. The orders are arbitrary, unreasonable and unlawful, and cannot be sustained."

It is, therefore, clear that Appellant, the Illinois Commerce Commission, which is a creature of the Illinois legislature, must, according to the highest court in the state, comply with the mandatory provisions of the act under which it is created, and that the action of the Supreme Court of Illinois in interpreting that portion of the state

statutes contains no federal question and is sufficient in itself to sustain the decision of said state court.

In addition to this, as has heretofore been pointed out, the judgment of the state court does not in fact rest upon any federal question as far as this particular appeal is concerned because notice was given in this case as required by the Emergency Price Control Act and proof thereof given to the Appellant, said Illinois Commerce Commission, and because the decision of the Supreme Court of Illinois does not have the effect of depriving car riders of property without due process.

IV.

Appellant Did Not Exhaust Its Remedies Before the Highest State Tribunal

Although Rule 44 of the Supreme Court of Illinois provides for rehearings, Appellant elected, as it admits in its jurisdictional statement, to accept the decision of the Supreme Court of Illinois as final without asking for a rehearing and did not ask for a rehearing.

Conclusion

For the reasons aforestated it is submitted that an appeal does not lie from said decision of the Supreme Court of Illinois to this Court.

Respectfully submitted,

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